

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Michelle Hynnek, f/k/a Kirkham,  
Complainant,

ORDER ON MOTIONS  
FOR SUMMARY DISPOSITION  
AND SANCTIONS

v.

Indianhead Council, Boy Scouts of  
America,

Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge on the motion of the Respondent for summary disposition and the motion of Complainant for Rule 11 sanctions.

Leslie E. Scott, Horton and Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401, appeared on behalf of Complainant Michelle Hynnek. Thomas P. Kane and Jennifer K. Muenchrath, Oppenheimer, Wolff & Donnelly, 1700 First Bank Building, St. Paul, Minnesota 55101, appeared on behalf of Respondent Indianhead Council, Boy Scouts of America. The record closed on the motions on April 11, 1995, upon receipt of Complainant's Memorandum in Opposition to Respondent's Motion and Requests for Sanctions.

Based on the record herein, the Administrative Law Judge makes the following:

ORDER

1. Respondent's motion for summary disposition is DENIED.
2. A ruling on Complainant's motion for Rule 11 sanctions is reserved and will be decided after the hearing.

Dated: April \_\_\_\_, 1995

---

STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

During the summer of 1992, Complainant worked for Respondent as a camp counselor at its "Navajo Camp", one of three camps on its "Tomahawk Reservation" near Rice Lake, Wisconsin. Complainant is a female and was 18 years old at the time. Complainant alleges that she was subject to a hostile work environment based on sex created by the Navajo Camp Director and that Respondent had actual and constructive knowledge of the sexual harassment, yet failed to take timely and appropriate action to end it. Respondent asserts that no such hostile work environment existed, that it took prompt remedial action once aware of the alleged harassment, and that it is entitled to summary disposition in its favor.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955) Louwagie v. Witco Chemical Corp. 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03. Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500K.

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid-America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp., Catrett, 477 U.S. 317, 324 (1986)).

The nonmoving party is entitled to the most favorable view of the evidence. Foley v. Allard, 427 N.W.2d 647, 649 (Minn. 1988). Viewed in the light most favorable to Complainant for the purposes of this motion, the undisputed facts appear as follows:

1. The Camp Director was responsible for the overall operation of the camp, including hiring, disciplining and firing employees. He was Complainant's immediate supervisor and worked with her on a daily basis.
2. Over the period of the summer, the Camp Director made a number of statements to, about, or in the presence of Complainant that were sexual in nature and that Complainant found embarrassing or humiliating.

3. While setting up the camp a week before the campers arrived, Complainant's boyfriend (and later, husband) who worked at one of Respondent's other camps, came to borrow some tools from the Navajo Camp Director. The Camp Director, in front of Complainant and co-workers, told Complainant something to the effect that he was not worried about the tools being returned because if they were not returned by her boyfriend, she could "cut him off." Complainant found this humiliating and inappropriate because she did not share her private life with others and because it was made in front of younger staff members. One of those younger staff members was a 15 year-old boy who later repeated the "cut him off" comment to Complainant some number of times.

4. On another occasion while setting up the camp, Complainant was the first to receive a mattress. A younger co-worker asked why she was the first to get the mattress and the Camp Director said it was because Complainant "had the nicest ass." Complainant was offended and upset by this comment.

5. On another occasion prior to the campers arriving, Complainant had just finished swimming and was in the process of putting on a shirt over her swim suit. The Camp Director yelled at her in front of a large group of people to cover herself up. This comment called attention to her and embarrassed her.

6. On another occasion, Complainant and two other female staff members were passing in front of the Camp Director's tent when he said something to the effect that he sometimes got the urge to change his clothes with the tent flaps open and if they didn't want to look, they had better turn their head. He went on to tell Complainant that she might notice that his "dick" was bigger than her boyfriend's.

7. On another occasion, Complainant was walking down a trail with other staff members when the Camp Director came up behind her and picked her up in his arms "like a groom carrying a bride through the door" and held her close to him. She told him to put her down and he did.

8. Shortly thereafter, the Camp Director called a meeting with Complainant and two of the other female staff members. (Apparently all or most of the staff members chosen to work at Navajo Camp by the Camp Director were female). He told them that he had heard rumors about them, that he wanted them to know that he would protect them, and asked if they had anything to say. Complainant then complained to him about the harassing behavior he had exhibited up to that point. The Camp Director acknowledged the inappropriate behavior and indicated that it would not continue. It was embarrassing and uncomfortable for Complainant to raise the issue with the Camp Director.

9. Later in the summer, Complainant was in the nearby town of Birchwood wearing a sweater and pair of shorts. The Camp Director was also in town and saw her and told her that he would fire her if she ever wore such clothing at camp. Later that evening, Complainant was sitting on a bench next to her boyfriend when the camp director came up and sat down next to her. He leaned up against her and told her that

her if her boyfriend were not there he would lick her thigh. He then pointed to a nearby area and told her that he had "gotten laid" there the previous summer.

10. Complainant did not welcome any of the Camp Director's sexual comments or touching and found them extremely offensive. Because he was her boss, however, she was afraid that if she continued to confront him, he might fire her.

11. Near the end of the summer, with one week left of camp, Complainant heard that in a discussion between the Camp Director and one of the male staff at another camp, that person had referred to the men working under him as "a bunch of dicks". To that, the Camp Director replied something to the effect that the only thing he had working for him was "a bunch of clits." That conversation was reported to Complainant by another man present at the discussion. That report upset Complainant. She felt she had nothing to lose at that point, since there was only a week left of the summer, and decided to report the Camp Director's harassment to Respondent's Reservation Director.

12. Complainant, along with another female staff member, did speak to the Reservation Director at that time. Complainant informed him of each of the incidents that she considered to be sexual harassment. The Reservation Director moved the Camp Director to a different campground for the remaining week of camp, but took little or no disciplinary action against him at the time. In Complainant's view, Respondent minimized the seriousness of the situation. Near the end of the year, Complainant learned that the Camp Director had again been selected to be Camp Director for the 1993 camping season. Although she had desired to return to work there during the 1993 season, she then decided she would not because of the Camp Director's return.

13. In February 1993, Complainant wrote Respondent a letter detailing her concern about the camp director's conduct. At that point, Respondent investigated her sexual harassment complaint, which did result in it being suggested to the Camp Director that he not return to the camp for the 1993 season. He apparently was able to reapply later.

Minn. Stat. Ch. 363 (the Minnesota Human Rights Act or "MHRA") prohibits discrimination by an employer based on sex. Minn. Stat. § 363.03, subd. 1(2). Minn. Stat. § 363.01, subd. 14, defines the term "discriminate" on the basis of sex to include "sexual harassment." Minn. Stat. § 363.01, subd. 41, states, in relevant part:

"Sexual harassment" includes unwelcome sexual advances, request for sexual favors sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature when:

. . .

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . .; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment. . . environment; and in the case of employment, the employer knows or should have known of the existence of the harassment and fails to take timely and appropriate action.

The incidents listed above, if proved, constitute sexual harassment. There were instances of unwelcome sexual advances, sexually motivated physical contact, and verbal conduct and communication of a sexual nature that had the effect of creating an intimidating, hostile, or offensive employment environment and Respondent knew of the harassment and failed to take timely and appropriate action. Thus, Complainant's evidence makes out a prima facie case of sexual discrimination. Bersie v. Zycad Corp., 417 N.W.2d 288, 290-91 (Minn. App. 1987), rev. denied (May 5, 1988); Bougie v. Sibley Manor, Inc., 504 N.W.

Respondent maintains that the atmosphere in the workplace did not rise to the level of sexual harassment, citing Klink v. Ramsey County, 397 N.W.2d 894 (Minn. App. 1986, rev. denied, (February 13, 1987); Bersie v. Zycad Corp., 417 N.W.2d 288 (Minn. App. 1987), rev. denied (May 5, 1988); and other cases. The Camp Director's actions toward Complainant as described above and in the evidence submitted demonstrate a level of sexual harassment that is fairly mild compared to many reported cases and the cases heard by this Office. Nonetheless, even the evidence presented through Complainant's deposition taken by opposing counsel is enough evidence to indicate the real possibility of substantial sexual harassment existing at the camp. The fact issues as to the extent of the sexual harassment that existed preclude summary disposition.

Another defense asserted by Respondent is that Respondent was not notified of any harassment until the end of the summer or until the following February when Complainant wrote her letter to Respondent, and that it then took prompt appropriate action. There are a number of factual disputes as to this issue, including the appropriateness of the discipline. Moreover, the Camp Director was involved in all of the incidents listed above. If a supervisor engages in the violative conduct, separate notice of harassment to the employer is not required. Kay v. Peter Motor Co., 483 N.W.2d at 481, 484 (Minn. App. 1992). Again, the fact issues as to Respondent's knowledge of the harassment and its corrective actions are at least sufficient to preclude summary disposition in Respondent's favor.

Complainant has moved that Respondent's counsel be sanctioned under Minn.R.Civ.P. 11 for misrepresenting Complainant's deposition testimony in the Motion for Summary Disposition. Under Minn. R. 1400.7050, the Administrative Law Judge has specific authority in human rights cases to impose any sanctions available in civil cases in the district courts of Minnesota. However, to rule on Complainant's motion at this point would be premature because Respondent has not had an opportunity to respond and it will be helpful to the Administrative Law Judge to observe the live testimony of Complainant in order to better understand her deposition testimony. Therefore, ruling on the motion is reserved and the parties will be allowed to further brief

the matter as part of their post-hearing briefs. If the matter is settled prior to hearing, the issue of sanctions will then be heard separately. The parties should also be advised that if the matter is settled prior to hearing, an appropriate payment to the Department of Human Rights for the costs of the proceedings should be included.

S.M.M.